

IN THE COURT OF APPEALS OF IOWA

No. 4-511 / 93-1905

THOMAS E. McBETH,
Plaintiff-Appellee,

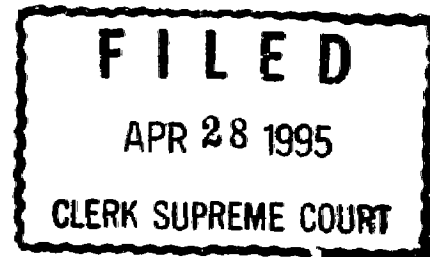
vs.

LESTER F. BAKER,
Defendant-Appellant.

TAMARA BOEDING,
Plaintiff-Appellee,

vs.

LESTER F. BAKER,
Defendant-Appellant.



Appeal from the Iowa District Court for Des Moines County, R. David Fahey,
Judge.

Tamara Boeding and Thomas McBeth filed suits against Lester Baker for
damages incurred in a multiple car accident. The jury returned verdicts favorable to
Boeding and McBeth. Baker appeals. **AFFIRMED IN PART AND REVERSED
IN PART AND REMANDED.**

John D. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport,
for appellant.

Michael J. Schilling of Cahill, Dieterich & Schilling Law Office, Burlington,
for appellee-Boeding.

T.K. Ford of Ford Law Offices, Burlington, for appellee-McBeth.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, P.J.

Defendant-appellant Lester F. Baker appeals following jury verdicts entered against him as a result of an automobile accident. Plaintiff-appellee Tamara Boeding was stopped for a red light and plaintiff-appellee Thomas E. McBeth stopped behind her. Defendant was unable to stop and hit McBeth's car and pushed it into Boeding's car. Each plaintiff sued the defendant separately. The suits were consolidated for trial. Defendant admitted the accident was his fault and there was no claim of fault on the part of the plaintiffs. The only issues submitted to the jury concerned damages. The jury returned a verdict for plaintiff Tamara Boeding of \$36,707.26 and for plaintiff Thomas McBeth of \$2789.88.

Defendant contends the allocation of jury preemptory challenges prejudiced him; his motion for mistrial when plaintiff McBeth mentioned insurance should have been granted; and the trial court erred in granting defendant's motion in limine to exclude a letter written by plaintiff Tamara Boeding's mother to one of Tamara's doctors. We affirm in part and reverse in part.

Defendant first contends the trial court abused its discretion in the allocating of preemptory challenges. There was to be an eight-person jury. Twenty jurors were selected. Plaintiff McBeth was given four challenges; plaintiff Boeding was given four challenges and the defendant was given four challenges.

Defendant contends plaintiffs' collectively should have been given four challenges. He contends, because of the way the jury was selected, he was forced to use two of his strikes to take off jurors who should have been stricken for cause. Defendant objected to the allocation and, after the trial court announced how the jury would be chosen, made a motion to sever the trial. That motion was overruled.

Iowa Rule of Civil Procedure 187(g) provides:

Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed, plaintiff and defendant shall alternately exercise their strikes.

A trial court is vested with broad discretionary power in acting on challenges for cause. *Nichols v. Schweitzer*, 472 N.W.2d 266, 273 (Iowa 1991). The test for reversible error is whether an abuse of discretion has occurred by the trial court. *Id.* The standard on finding an abuse of discretion requires that the reasons for the trial court's actions are clearly unreasonable. *Id.* at 274.

A party claiming an error in granting excessive preemptory challenges to another party is entitled to relief upon showing, to the satisfaction of the court: (1) actual resultant prejudice; or (2) a clear and convincing probability of resultant prejudice. *Wilson v. Ceretti*, 210 N.W.2d 643, 646 (Iowa 1973). Defendant did not make the required showing. The trial court did not abuse its discretion in allocating preemptory challenges. Defendant's second ground is that he should have been granted a mistrial when plaintiff McBeth mentioned an insurance person.

On direct examination, McBeth testified there was one photograph of his damaged truck that had not been admitted into evidence. On cross-examination, when questioned about this photograph, McBeth said he had not taken any photographs himself of the truck "because the insurance person that came out there stated that the only photographs that were needed were hers."

Defendant moved for a mistrial because of this reference to insurance. The court reserved ruling. At the close of the evidence, defendant filed a motion for mistrial and for a new trial. The court denied both motions.

Defendant contends the district court should have granted his motions for mistrial. He states when McBeth testified there was a photograph not introduced at the trial, McBeth raised an inference either defendant's counsel or insurance carrier

had withheld evidence. Defendant claims he was prejudiced by the improper reference to insurance and was not able to rebut McBeth's testimony about the number of photographs taken of his truck.

A trial court has broad, though not unlimited, discretion in ruling on motions for mistrial. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 874 (Iowa 1989). The trial court is in the better position to appraise the situation in the context of the full trial. *Id.*

Evidence of insurance can prejudice defendants by influencing jurors to return liability verdicts against defendants on insufficient evidence and by causing jurors to bring in larger damage verdicts than they would if they believed the defendant would be required to pay. *Handley v. Farm Bureau Mut. Ins.Co.*, 467 N.W.2d 247, 249 (Iowa 1991).

Prejudice is not presumed from every mention of insurance at trial. *Stover*, 434 N.W.2d at 874. A brief mention, as opposed to a blatant reference, may not prejudice a defendant. *Id.* The trial court did not abuse its discretion. Defendant's last contention is he should be granted a new trial because the district court erred in excluding evidence he sought to introduce for the purpose of impeaching the testimony of Carol Boeding, Tamara Boeding's mother.

In December 1992, after Tamara had filed this lawsuit, Carol wrote a note to Dr. Marc Hines, Tamara's treating physician. The note contained the following statement:

If possible, since there is a lawsuit involved, I would appreciate it if you do not say anything about this being the result of an accident at this time My attorney advised me to fill out the form stating it is not known at this time if it is the result of an accident.

Carol testified at trial concerning her daughter's injuries, medical treatment and the effect the accident had on her daughter's life. Defendant sought to use the note

to impeach Carol's testimony. Defendant advances his purpose for introducing the note was to call into question the credibility and reliability of Carol as a historian of his daughter's accident problems. Dr. Hines had testified it was important to get information as he did from Carol and it is important to him that the information is correct. Defendant contends the fact Carol was proposing information be withheld from her insurance company so the expenses would be paid and they would not establish their subrogation rights.

The trial court reasons that allowing the evidence might pose a danger to plaintiff, Tamara Boeding, in that if the jury finds Carol is lying to the insurance company, they will transfer her conduct to Tamara, who is an adult.

We agree with defendant that this is not a valid reason for disallowing the impeachment evidence.

Tamara's mother testified in support of a number of Tamara's claimed damages. The fact that Carol did not want the doctor to be candid with her own insurance company shows that she might change facts for a pecuniary interest. *See State v. Peterson*, 219 N.W.2d 665, 671 (Iowa 1974). The impeachment evidence was relevant. While the impeachment evidence might cause the jury to reassess Carol's testimony in regards to her daughter's Tamara's claimed damages, it would have no relevance to plaintiff Thomas McBeth's claim as it would go only to Tamara's damages.

We affirm the judgment of Thomas McBeth. We reverse and remand for new trial on the damage issue of the case of Tamara Boeding.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.